

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

GroupMe, Inc.)

Petition for Declaratory Ruling)

CG Docket No. CG 02-278

**COMMENTS OF TWILIO INC. IN SUPPORT OF
GROUPME, INC. PETITION FOR DECLARATORY RULING**

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Twilio Inc. (“Twilio”) submits these comments in response to the Federal Communications Commission’s Public Notice seeking comment on the Petition for Expedited Declaratory Ruling from GroupMe, Inc. (“GroupMe”),¹ which seeks a declaratory ruling clarifying the scope of the Telephone Consumer Protection Act (“TCPA”).²

I. INTRODUCTION AND SUMMARY

Twilio urges the Commission to grant GroupMe’s Petition and end a long-standing source of uncertainty regarding text message communications (also known as SMS) and the TCPA. SMS innovation is quickly outpacing Commission regulation. The Commission has not addressed the regulatory status of SMS under the TCPA since 2003 when it first stated that SMS should be considered a “call” under the statute and regulations. Since then, SMS has exploded in popularity and consumers and businesses see incredible value in SMS as a communications medium for sharing alerts, marketing, and other information. This rise in popularity combined with the absence of Commission guidance³ has turned the TCPA into plaintiffs’ lawyers’ “go-to” statute to sue virtually any company that uses SMS for marketing or informational purposes for millions of dollars, regardless of whether there was an actual

¹ *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition” or “Petition”).

² See Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, CG Docket No. CG 02-278, DA 12-1180 (July 24, 2012).

³ Several petitions in addition to GroupMe’s are pending at the Commission that seek Commission guidance related to SMS. See *Public Knowledge, et al.*, Petition For Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules, WT 08-7 (Dec. 11, 2007); Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting’s Petition for Declaratory Relief that Text Broadcasters are Not “Senders” of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 09-2387 (Nov. 9, 2009).

violation that the TCPA is intended to prevent. The TCPA is quickly becoming a deterrent to using SMS for any reason, because the risk of a TCPA lawsuit is too great.

The Commission should issue rule modifications, or at the very least an order, that clarifies the two points raised by GroupMe concerning the definition of automatic telephone dialing system (“ATDS” or “autodialer”) and who may notify a sender of the called party’s prior express consent through changes to the TCPA regulations. These clarifications would help bring some rationality to TCPA lawsuits and require plaintiffs’ lawyers to do more than just duplicate basic complaints against any company using SMS to reach consumers. At the same time, consumers would continue to be protected from unsolicited text messages because companies actually using equipment that dials random and sequential telephone numbers or who make calls without prior express consent would be liable under the TCPA. Twilio urges the Commission to act on GroupMe’s petition and provide the requested rule changes.

II. BACKGROUND

A. The Purpose of the TCPA

The TCPA was intended “[t]o protect consumers from unwanted calls.”⁴

However, recognizing that the TCPA called for a balancing of consumer privacy and business interests, the Commission in crafting the initial rules that implemented the TCPA stated that “[o]ur task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests of telemarketers.”⁵ In

⁴ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 55 Communications Reg. (P&F) 356, 2012 WL 507959, ¶ 4 (F.C.C. Feb. 15, 2012).

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, ¶ 3 (1992) (“1992 TCPA Order”); *see also id.* ¶ 59 (“Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing.”).

addition to protecting privacy rights, the Commission's rules are focused on maintaining the health and safety of consumers by preventing unwanted calls.⁶ As the GroupMe Petition explains, Congress and the Commission were concerned that unwanted calls can "seize" telephone lines and prevent any outgoing or incoming calls leading to a potential safety risk.⁷

In 2003, the Commission recognized that the changing marketplace of telemarketing and facsimile advertisements warranted an update to the TCPA rules. In addition to establishing a do-not-call list, the Commission revised rules for facsimile advertisements and clarified the connection between "senders" and "fax broadcasters."⁸ Relevant to GroupMe's Petition, is the Commission's consideration of the relationship between companies wishing to send fax advertisements and fax broadcasters, the separate companies with the technology to send fax advertisements. The Commission recognized that if a fax broadcaster simply provides the transmission technology and does not provide telephone numbers or determine the content of an advertisement, the fax broadcaster should not be liable under the TCPA. Specifically, the Commission found:

The Commission has determined to amend the rules to explicitly state that a fax broadcaster will be liable for an unsolicited fax if there is a high degree of involvement or actual notice on the part of the broadcaster. The new rules provide that if the fax broadcaster supplies the fax numbers used to transmit the advertisement, the fax broadcaster will be liable for any unsolicited advertisement faxed to consumers and businesses without their prior express invitation or permission. We agree, however, that if the company whose products are advertised has supplied the list of fax numbers,

⁶ *Id.* ¶ 58 ("The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety.").

⁷ GroupMe Petition at 12-13.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) ("2003 TCPA Order").

that company is in the best position to ensure that recipients have consented to receive the faxes and should be liable for violations of the prohibition. Therefore, the fax broadcaster will not be responsible for the ads, in the absence of any other close involvement, such as determining the content of the faxed message.⁹

The Commission also clarified that for common carriers, “if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable for the facsimile.”¹⁰ In all cases, the Commission is focused on “nature of an entity’s activity” to determine whether the TCPA applies to that entity.¹¹ In short, it is clear that the Commission recognizes where an entity simply provides a transmission path, in the absence of any greater involvement, that entity should not be liable under the TCPA for any alleged violations of the actual sender.

B. The Increasing Popularity of SMS and the Rise of SMS TCPA Litigation

In 2003 the Commission also extended the term “call” in the TCPA to incorporate SMS, which courts have subsequently followed.¹² Parallel to this expansion of the TCPA, the use of SMS has skyrocketed in the past decade. As the Commission has noted, “consumers are increasingly substituting among voice, messaging, and data services, and, in particular, are willing to move from voice to messaging or data services for an increasing portion of their

⁹ *Id.* ¶ 195.

¹⁰ *Id.* ¶ 196.

¹¹ *Id.* ¶ 195.

¹² *Id.* ¶ 165 (2003) (“This [prohibition] encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls...”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (affirming FCC’s determination that a text message is a call for purposes of 47 U.S.C. § 227); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1009 (N.D. Ill. 2010) (same); *see also Kramer v. Autobyte, Inc.*, 2010 WL 5463116 (N.D. Cal. 2010) (same); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831 (Ariz. App. 2005) (same).

communications needs.”¹³ As consumers use SMS in increasing numbers, companies have created innovative and beneficial SMS-based services such as weather alerts, emergency notifications, sports scores, group text messaging, and mobile coupons, among many others. Technological advances and creative thinking are powering the expansion of SMS by consumers and companies, with only more to come.

Unfortunately, with the expansion of the TCPA and the expansion of the use of SMS by consumers and companies, TCPA lawsuits have significantly increased, causing companies that use SMS to face million dollar judgments or settlements. These suits have also raised legal questions about the TCPA that remain unresolved or have resulted in inconsistent opinions in the courts. In fact, TCPA lawsuits are being filed on almost a daily basis across the country. For example, for the week of July 30 to August 3, 2012, at least three federal suits were filed in Virginia, California, and Illinois against Papa John’s, the Weather Channel, and the Huffington Post.¹⁴ Other suits involve companies like Microsoft, Google, Pizza Hut, Nascar, and Gamestop.¹⁵ The same plaintiffs’ law firms are involved in many of these TCPA lawsuits, duplicating the same basic complaint against any company that uses SMS. The companies in turn must spend energy and dollars fighting these lawsuits, and often settle for millions of

¹³ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9687-9688, ¶ 4 (2011) (*Fifteenth Mobile Wireless Report*).

¹⁴ *Downing v. Papa John’s USA, Inc. et al.*, Case No. 2:12-CV-00422 (E.D. Va., filed July 30, 2012); *Michael Rossell v. The Weather Channel LLC*, Case No. 3:12-cv-04098 (N.D. Ca., filed Aug. 2, 2012); *Alicia St. Leger v. thehuffingtonpost.com*, Case No. 1:12-cv-06138 (N.D. Ill., filed Aug. 3, 2012).

¹⁵ *Neil Smith v. Microsoft Corp.*, Case No. 3:11-cv-01958 (S.D. Ca.); *Agne v Rain City Pizza, LLC, et al.*, Case No. 2:10-cv-01139 (W.D. Wa.); *Keim v. Pizza Hut of America, Inc.*, Case No. 9:12-cv-80242 (S.D. Fl.); *Jaber et al. v. Nascar Holdings Inc.*, Case No. 3:11-cv-01783 (S.D. Ca.); *Karayan v. GameStop Corp. et al.*, Case No. 1:11-cv-01777 (S.D. Ca.); *Pimental v. Google Inc. et al.*, Case No. 4:11-cv-02585 (N.D. Ca.).

dollars, despite the fact that the vast majority of the users of their SMS services never complain. In contrast to the claims in these lawsuits, most consumers want the SMS alerts, coupons, and other information provided by through SMS marketing by the companies.

Despite the upheaval in the legal landscape relating to the TCPA and SMS, the Commission has provided little guidance since its 2003 expansion of the term “call.” As useful SMS-based services are created that benefit consumers, the Commission should take this opportunity to provide clarity in the TCPA with rule revisions, or at the very least a clarifying order, in light of these technological advances to ensure that the SMS technologies can continue to develop and benefit consumers, while preserving the protections of the TCPA to eliminate truly unwanted SMS.

C. Twilio’s Role in the Modern Telecommunications Network

Twilio was founded over three years ago as an innovative Internet-based cloud communications company that is reinventing telecommunications by merging cloud computing, web services, and traditional telecommunications. Twilio provides an application programming interface, or “API,” to developers who use the API to create applications and programs. An API is a software language and message format used to communicate with an operating system or other application programs. APIs are typically pre-fabricated blocks of software code which perform certain low-level, but crucial functions, such as displaying text or graphics on a computer screen. APIs let developers and programmers create more sophisticated programs and applications from the base of the relatively simple APIs.

Twilio’s API allows a developer to integrate traditional phone service and SMS with existing programming languages. Developers can create new applications or add features to existing products to allow those applications to make and receive phone calls and text messages. Using Twilio’s API, web developers and businesses can build sophisticated unified

communications solutions such as call centers, office phone systems, call tracking tools, SMS alerts, and more that interoperate with multiple telephone networks. Twilio's API works simultaneously across platforms, allowing web browsers, mobile phones, and tablets running iOS or Android to communicate seamlessly. Over 100,000 developers have used Twilio to integrate telecommunications into their applications and products.

While Twilio's API enables others to make and receive phone calls and SMS, Twilio does not directly influence or control how its customers' applications send or receive SMS. The API is simply the building block of the application created and used by Twilio's customers. Twilio's Acceptable Use Policy and Terms of Service require that its customers do not violate the TCPA and other laws, but Twilio does not monitor messages or calls.¹⁶ If Twilio learns of a violation of the law, Twilio has the right to terminate that customer's use of Twilio's API. Much like the fax broadcasters described above and common carriers, Twilio simply transmits the call or SMS per the routing instructions from the developer's application.

Many new products and services developed using Twilio often rely on text messages to convey information and reach consumers. For example, Intuit Inc. used Twilio to develop a new security feature which sends a verification code to the online user's phone, via phone call or SMS, when an online user attempts to change sensitive data. This security feature prevents identity theft while relying on the cloud to save time and money in implementation. WalMart was able to create SMS notifications for its "Values of the day" discounts using Twilio, which allowed WalMart to test the idea quickly and inexpensively before rolling out the feature.

New text message-based companies are also being created using Twilio as a foundational tool. GroupMe, which provides a free group text messaging service, was created

¹⁶ Twilio Acceptable Use Policy, available at <http://www.twilio.com/legal/aup>; Twilio Terms of Service, available at <http://www.twilio.com/legal/tos>.

using Twilio during a programming contest in 2010. GroupMe was quickly able to add features and attract users by using Twilio to easily increase the reach of their products and services.

GroupMe, one of the hottest recent Internet telecommunications companies, and the jobs created by GroupMe would not exist without Twilio. GroupMe has been so successful that it was acquired by Skype.

Twilio is part of a new generation of telecommunications companies that are benefiting consumers by opening up new text message applications, products, and services for existing companies like Intuit and Walmart, and newly-formed companies like GroupMe. Twilio files these comments because text messages are an important part of its business and the uncertainty surrounding text messages and the TCPA is harmful to the industry and Twilio's customers.

D. Twilio's Role in SMS Delivery

As discussed above, Twilio's API acts as an intermediary between the traditional telecommunications infrastructure and application developers. This intermediary role results from Twilio's agreements with Amazon Web Services, a cloud hosting company, traditional telecommunication carriers, like Verizon, Bandwidth.com, and Level 3 Communications, and SMS aggregators, like Syniverse and Sybase, among others. Twilio's API allows a developer to interact with all of these entities as necessary to hear from or reach a consumer through calls and SMS, but the developer does not need any direct relationship with those parties. Twilio's API facilitates the call or SMS path through those entities as necessary and as directed by the developer's application.

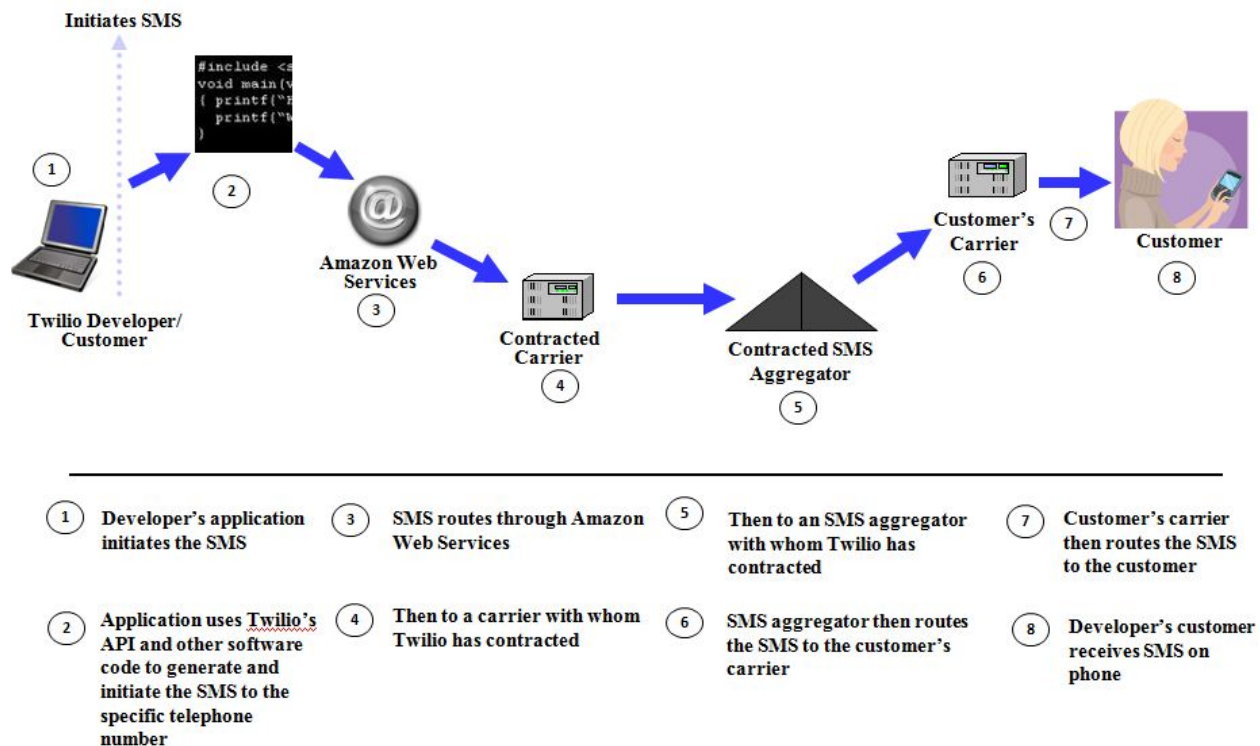
As an example, a Twilio customer might create an application that allows a consumer to enter their families' and friends' birthdays into the application and the application then sends an SMS alert the day before a particular birthday. The developer would first have to

create the application using Twilio's API and other coding languages, and then market the application to obtain customers of its own. The developer would need to obtain express consent from its customers to send an SMS to the customer, which would likely be in the terms of service of the application. After the *customer* enters the birthdays, the application would then send an SMS once there was a triggering event, here the day before an entered birthday. The path of this SMS message, which would say something like "Just a reminder, Aunt Helen's birthday is tomorrow," would transmit down the following path:

- (1) Starts with the Developer's application
- (2) Application uses Twilio's API and other software code to generate and initiate the SMS to the specific telephone number
- (3) SMS routes through Amazon Web Services
- (4) Then to a carrier with whom Twilio has contracted
- (5) Then to an SMS aggregator with whom Twilio has contracted
- (6) SMS aggregator then routes the SMS to the customer's carrier
- (7) Customer's carrier then routes the SMS to the customer
- (8) Developer's customer receives SMS on phone

This path is illustrated in **Figure 1**.

Figure 1



If the developer's customer sends an SMS back to the birthday application, the path above would essentially operate in reverse except that customer's carrier would transmit the SMS through the most efficient route given its contractual relationships with various other carriers and aggregators.

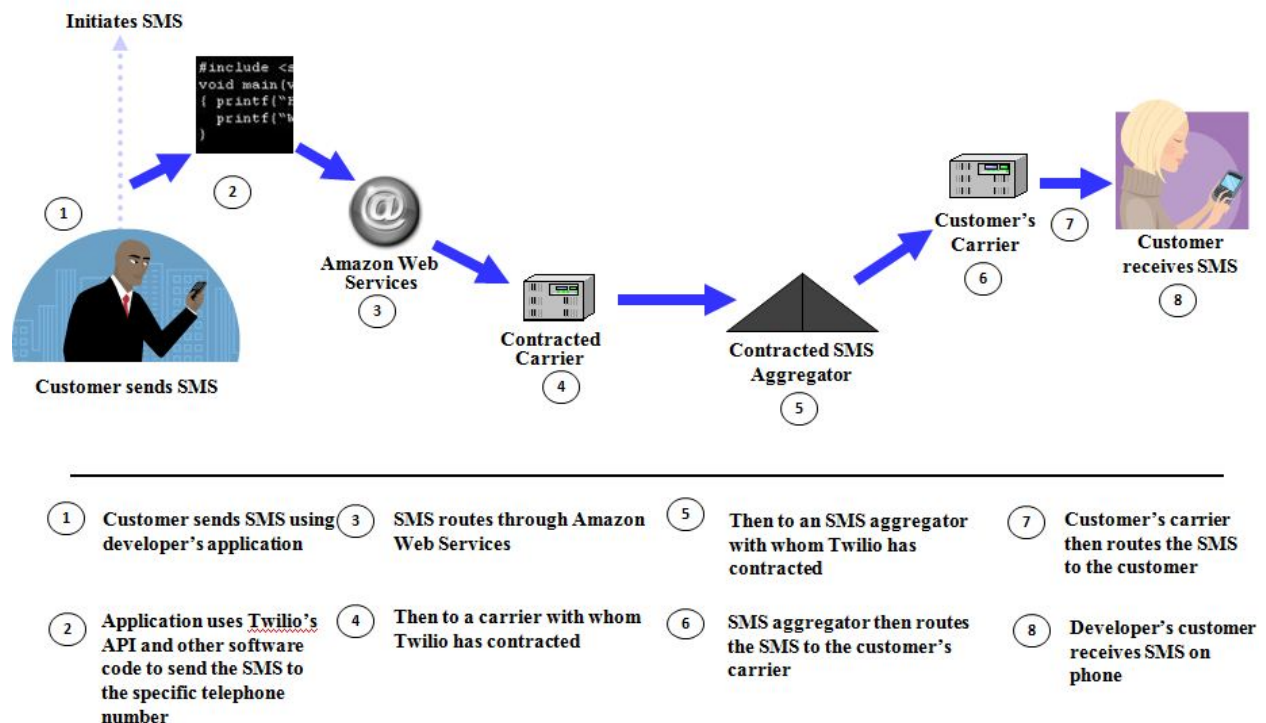
Another variation using Twilio's API is where the developer has created an application that transmits SMS between cell phone users, such as a group texting application. There, the path would be essentially the same, except that the developer's *customer* would initiate the SMS, rather than the application. This path is represented as follows:

- (1) Customer sends SMS using developer's application
- (2) Application uses Twilio's API and other software code to send the SMS to the specific telephone number

- (3) SMS routes through Amazon Web Services
- (4) Then to a carrier with whom Twilio has contracted
- (5) Then to an SMS aggregator with whom Twilio has contracted
- (6) SMS aggregator then routes the SMS to the customer's carrier
- (7) Customer's carrier then routes the SMS to the customer
- (8) Developer's customer receives SMS on phone

This path is represented in **Figure 2**.

Figure 2

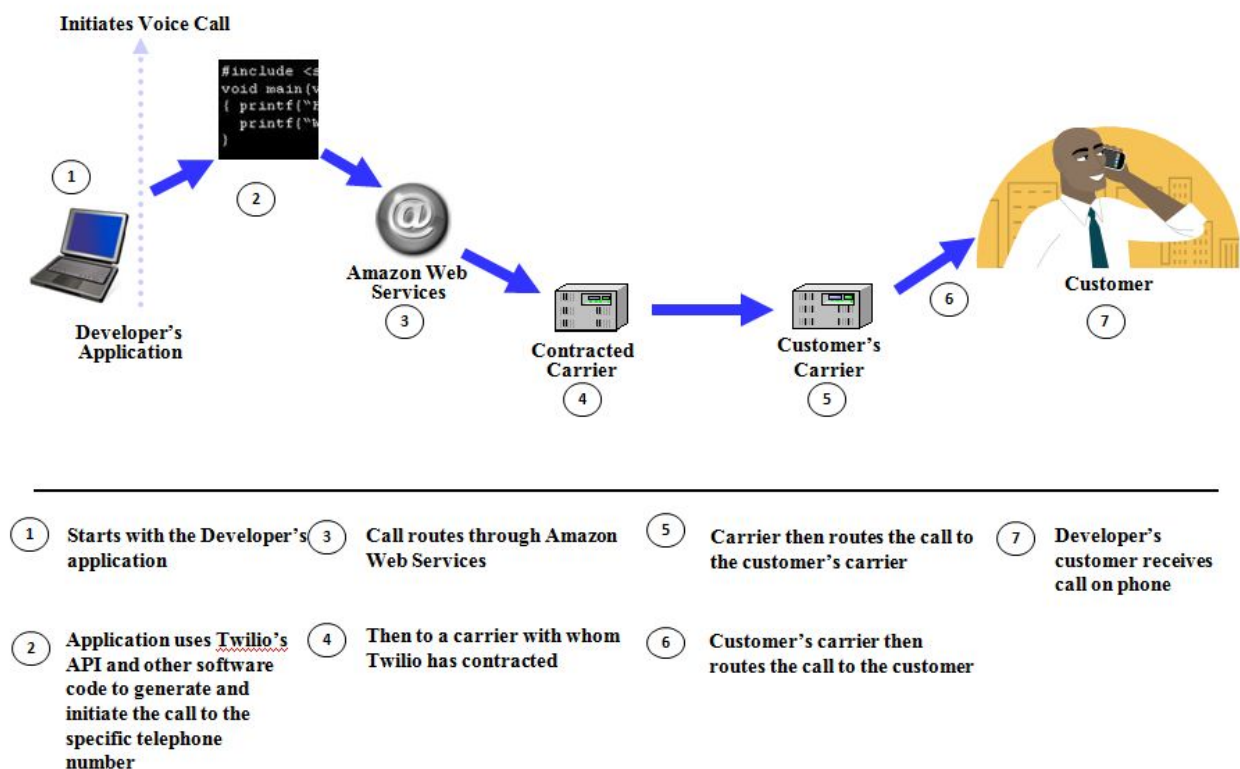


A voice call would follow a similar pattern except an SMS aggregator would not be necessary. If in the above birthday application example, after the *customer* enters birthdays into the application, the application performed a call reminder instead of sending an SMS, the path would be as follows:

- (1) Starts with the Developer's application
- (2) Application uses Twilio's API and other software code to generate and initiate the call to the specific telephone number
- (3) Call routes through Amazon Web Services
- (4) Then to a carrier with whom Twilio has contracted
- (5) Carrier then routes the call to the customer's carrier
- (6) Customer's carrier then routes the call to the customer
- (7) Developer's customer receives call on phone

This path is represented in **Figure 3**.

Figure 3



In sum the developer's *application* or the developer's *customer* is the starting point for each instance where a call or SMS is directed at a consumer using Twilio's API. In

each circumstance, Twilio is akin to a common carrier, aggregator, or fax broadcaster and no more “sends” or “initiates” the call or message than any of those entities.

III. THE FCC SHOULD CLARIFY ASPECTS OF THE TCPA IDENTIFIED BY GROUPME

A. The Definition of ATDS Must Be Reasonable to Avoid Absurd Results.

The TCPA prohibits using an automatic telephone dialing system (“ATDS” or “autodialer”) to make any call without the prior express consent of the called party.¹⁷ An ATDS is defined as “equipment that has the *capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹⁸ This definition has not changed since the enactment of the TCPA in 1991, and has become overwhelmed by technological advances, especially if “capacity” is interpreted broadly. Almost all modern telecommunications equipment has the “capacity,” if “capacity” means the mere possibility, to autodial random or sequential numbers without human intervention through software and/or hardware alterations.

The Commission should alter the existing rules to clarify the meaning of “capacity” in the definition of an ATDS and find that “capacity” means the “present and immediate ability” to store and dial random or sequential telephone numbers. At the very least, the Commission should issue an order clarifying the meaning of capacity. A broader definition of capacity to mean the “possibility or option” to store and dial random or sequential telephone numbers, as some courts have found, would be an absurd reading of the TCPA because nearly every piece of computer and telecommunications equipment today has the “possibility or option” to be reprogrammed or altered to perform such functions. Under the broader interpretation of

¹⁷ 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁸ *Id.* § 227(a)(1) (emphasis added); 47 C.F.R. § 64.1200(f)(2).

“capacity,” the ATDS requirement in the TCPA is actually written out of the statute because the very fact that a call has been made using computer and telecommunications equipment would then satisfy the ATDS requirement. The Commission should clarify that such a result is not consistent with the TCPA, and clarify that the narrower definition of ATDS is the appropriate definition.

The Commission has always worked towards statutory interpretations that are reasonable and consistent with Congressional intent.¹⁹ Here, in order to avoid reading ATDS out of the TCPA entirely, the Commission should clarify that capacity means that equipment must have the present and immediately ability to dial random or sequential telephone numbers. The relevant rule currently reads:

The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.²⁰

In order to clarify the meaning of capacity, the Commission should issue a new rule as shown in this red-line:

The terms automatic telephone dialing system and autodialer mean equipment which has the ~~capacity~~ present and immediate ability to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

¹⁹ See e.g., *In the Matter of Implementation of Section 210 of the Satellite Home Viewer Extension & Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd. 14242, 14262 ¶ 10 and n. 43 (2005) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *Lawson v. Suwanee Fruit & S.S. Co.*, 69 S. Ct. 503 (1949) (Statutory definitions usually control the meaning of statutory words, but not where obvious incongruities in language would be created and major purpose of statute would be destroyed); *Teva Pharm., USA, Inc. v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (asserting that the FDA must interpret that statute to avoid absurd results and further congressional intent)).

²⁰ 47 C.F.R. 64.1200(f)(2).

At the very least the Commission should issue an order stating that capacity means “present and immediate ability.”

This narrower definition of “capacity” is consistent with Congressional intent to protect consumers from calls that seized telephone lines and to limit the delivery of thousands of identical prerecorded messages.²¹ Through the TCPA, Congress intended to prohibit a specific type of equipment that enabled mass prerecorded identical telephone calls, but could not have intended to prohibit any and all equipment that might be altered, but was not presently, engaged in such action.

Clarification by the Commission will ensure that the marketplace for innovative and useful SMS-based applications and services can continue to grow and benefit consumers without the threat of TCPA lawsuits, while still prohibiting the use of ATDS equipment that causes actual harm to consumers. The Commission should clarify that “capacity” in the definition of ATDS in the TCPA means the “present and immediate ability” to dial random or sequential numbers.

B. Prior Express Consent Must Be Obtained By The Initial Person or Entity Making the Call And Can Be Given By Intermediaries.

The TCPA requires “prior express consent” before sending text messages to a called party.²² As GroupMe points out, for informational, non-telemarketing calls the Commission allows oral or written consent and does not want to discourage “purely informational messages.”²³ The Commission should grant GroupMe’s request and confirm that

²¹ See GroupMe Petition at 12-13.

²² 47 U.S.C. § 227(b)(1)(A)(iii).

²³ GroupMe Petition at 16; *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1841 ¶ 28-29 (2012).

an intermediary can provide notice to a sender that a third party has granted consent to receive SMS from the sender. The sender should then be able to rely on that notice of consent and transmit SMS to the third party without TCPA liability.

In addition to clarifying who may provide consent, the Commission should confirm that only the initial person or entity making the call has an obligation to obtain consent before transporting a message; intermediaries in the transmission path should not be required to obtain consent, nor should intermediaries have any TCPA liability when they simply maintain the transmission path of a call or message initiated by a sender. Intermediaries should be able to rely on the *sender's* transmission of the message that the sender has already obtained any necessary consent. The Commission should thus clarify and confirm that entities in the transmission path should be free of TCPA liability, because they have no obligation to obtain consent under the TCPA.²⁴ Under this clarification, it would be clear that Twilio cannot be the *sender* because it is an intermediary in the path of an SMS as shown in the chart above. Twilio's customers or Twilio's customers' customers would be the senders because they are directing the SMS and are interacting with the cell phone user that is receiving the SMS. Twilio would have no obligation to obtain prior express consent, and therefore Twilio would have no liability under the TCPA if it simply maintained the transmission path of an SMS allegedly sent without prior express consent.

Twilio recommends the following addition to the definitions in 47 C.F.R.

64.1200(f) for "prior express consent":

²⁴ This issue is before the Commission in the Petition from Club Texting. *See* Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting's Petition for Declaratory Relief that Text Broadcasters are Not "Senders" of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 09-2387 (Nov. 9, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020347885>.

‘Prior express consent’ must be obtained by the initial person or entity first making or initiating the call. For non-telemarketing, informational calls or text messages to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, the initial person or entity first making or initiating a call may rely on a representation from an intermediary that the intermediary has obtained the requisite prior express consent from the called party.

This addition to the rules is consistent with the TCPA and GroupMe’s Petition. At the very least the Commission should issue an order clarifying who must obtain prior express consent, as well as who may provide prior express consent consistent with the above.

IV. CONCLUSION

In sum, Twilio strongly urges the Commission to grant GroupMe’s Petition, and clarify both the definition of ATDS and the entities that must obtain and can provide prior express consent through rule changes, or at the very least a clarifying order. These clarifications would protect consumers from unsolicited SMS and calls while preventing the TCPA from becoming essentially a prohibition on the use of SMS by any company to interact with its customers.

Dated: August 30, 2012

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